

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 75

Docket No. DC-3443-08-0249-C-1

**Julius L. Phillips,
Appellant,
v.
Department of the Navy,
Agency.**

April 23, 2010

Leamon D. Brinson, Dahlgren, Virginia, for the appellant.

O. Tom Crane, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This matter is before the Board upon a timely petition for review (PFR) of a compliance initial decision (CID), which found the agency in compliance with the administrative judge's prior remand initial decision (RID). For the reasons set forth below, we GRANT the appellant's PFR under [5 C.F.R. § 1201.115](#)(d), we FIND that the agency is NOT IN COMPLIANCE with the RID, and we REVERSE the CID. We ORDER the agency to reconstruct the selection process for the GS-7 police officer positions, consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant, a GS-6 police officer, applied for higher grade police officer positions under vacancy announcement DON0083, which was an open continuous announcement for which merit promotion procedures were used, and he was not selected for any positions. *Phillips v. Department of the Navy*, [110 M.S.P.R. 184](#), ¶¶ 2, 3 (2008). After exhausting his administrative remedies with the Department of Labor, the appellant filed a Veterans Employment Opportunities Act of 1998 (VEOA) appeal based on his nonselection for GS-7 and GS-8 police officer positions, but the administrative judge denied his request for corrective action.¹ *Id.*, ¶¶ 3-4, 8-9. On review, the Board concluded that the agency violated the appellant's right to compete under merit promotion procedures, and it directed the administrative judge to order the agency to reconstruct the selection process for the GS-7 positions in Dahlgren, Virginia (the appellant's preferred location), under this vacancy announcement. *Id.*, ¶¶ 7, 9-10, 14.

¶3 The administrative judge issued a RID, consistent with the Board's Opinion and Order, granting the appellant's request for corrective action for the GS-7 positions, and ordering the agency to reconstruct the selection process with respect to GS-7 positions filled pursuant to the relevant vacancy announcement from July 30, 2007, to the present, at the Dahlgren location. *Phillips v. Department of the Navy*, MSPB Docket No. DC-3443-08-0249-B-1 (B-1 File), Tab 6 at 3.

¶4 The appellant and the agency each filed a PFR of the RID; the Board denied both for failure to meet the review criteria. *See Phillips v. Department of the Navy*, [111 M.S.P.R. 557](#), ¶¶ 5-6 (2009). However, the Board noted that the agency asserted on PFR that it complied with the administrative judge's reconstruction order, and it provided documentation regarding its reconstructed selection process. *See id.*, ¶ 7 (describing the evidence submitted by the agency).

¹ Because the appellant's nonselection for the GS-8 position is not relevant to this appeal, we need not discuss it further.

In his response to the agency's PFR, the appellant alleged that the agency's reconstructed selection process did not comply with the administrative judge's reconstruction order. Specifically, the appellant complained that (1) the agency's reconstructed internal certificates, showing that he was not selected for either of two GS-7 positions, were dated 8 days before the appellant's interview date, and thus, his "interview was pointless," (2) there was no information regarding the other candidates' scores or resumes or the questions asked of the other candidates, and (3) he was not given advance notice of his March 18, 2009 interview, whereas 3 of the applicants from the hiring process in 2007 were afforded the questions in advance of the interview. *Id.*, ¶ 8. The Board also expressed concerns regarding the agency's reconstructed selection process, noting that it was not clear whether the original selectees were removed from their respective positions during the reconstructed selection process, and further, that because the agency's reconstructed internal certificates stated "N/A" in response to the question of whether a selection was made from the certificate, it did not appear that a candidate was selected for any vacancy during the reconstructed selection process. *Id.* In light of these concerns, the Board forwarded the appellant's allegations of noncompliance to the Washington Regional Office for docketing and adjudication as a petition for enforcement (PFE). *Id.*, ¶¶ 8, 10.

¶5 This proceeding followed. *See Phillips v. Department of the Navy*, MSPB Docket No. DC-3443-08-0249-C-1 (Compliance File), Tab 1. After the parties filed numerous submissions, *see* Compliance File, Tabs 3-4, 7-8, a hearing was held on August 26, 2009, *see* Hearing Tapes (HTs).

¶6 On September 11, 2009, the administrative judge issued a CID, which denied the PFE because she "[found] no evidence that the selection board or selecting official acted improperly with respect to the appellant's interview and nonselection," noting that VEOA only guarantees that a veteran will be given consideration, and finding that the agency properly considered the appellant

during its reconstructed selection process for the GS-7 position.² Compliance File, Tab 11 at 5. Thus, she concluded that the agency complied with the RID. *Id.* at 5-6. The appellant filed a PFR, claiming that the administrative judge erred, that the reconstruction was “merely a ruse to satisfy the Court Order,” and that there were no open positions to fill during the reconstructed selection process. Compliance Petition for Review File (Compliance PFR File), Tab 1 at 3. The agency filed a response. Compliance PFR File, Tab 4.

ANALYSIS

¶7 The Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board order. *Kerr v. National Endowment for the Arts*, [726 F.2d 730](#), 733 (Fed. Cir. 1984). The Board’s authority to remedy noncompliance is broad and far-reaching and functions to ensure that employees or applicants for employment are returned to the status quo ante or the position that they would have been in had the unlawful agency action not occurred. *Endres v. Department of Veterans Affairs*, [107 M.S.P.R. 455](#), ¶ 9 (2007), *enforcement dismissed*, [108 M.S.P.R. 606](#) (2008); *see Kerr*, 726 F.2d at 733. The agency has the burden of proving that it has fully complied with a Board final decision. *See Hill v. Department of the Air Force*, [60 M.S.P.R. 498](#), 501 (1994). In order to comply with prior orders, the agency must show that its reconstruction of the selection process for vacancy announcement DON0083 at the Dahlgren location, since July 30, 2007, was in accordance with applicable veterans’ preference laws and that any subsequent appointment to the GS-7 police officer

² As discussed above, the appellant claimed that the discrepancies in the dates that appeared on the reissued certificates supported his contention that he was not selected before he was even interviewed. *Phillips*, [111 M.S.P.R. 557](#), ¶ 8. The administrative judge credited the agency’s explanations that “the dates on the certificates were just the dates they were printed or downloaded for use by the selection board, [that] the reason each candidate was noted as ‘not selected’ was simply the default setting automatically generated by the online CHART hiring system the agency uses,” and that when a candidate is selected, that choice must be manually entered into the system. Compliance File, Tab 11 at 4-5.

positions was the result of fair and lawful consideration of the pool of candidates, including the appellant, under an appropriate reconstruction. *Phillips*, [110 M.S.P.R. 184](#), ¶ 10; *Endres*, 107 M.S.P.R. 455, ¶ 9.

The agency's reconstructed selection process

¶8 The agency indicated that, during the relevant timeframe, it made two selections pursuant to vacancy announcement DON0083 at the Dahlgren location. *See* Compliance File, Tab 3 at 8. The agency claimed the first selection, for a lead police officer position (sergeant), was processed via certificate NW7-GS0083-07-K180223-C-MP-17. *Id.* It claimed the second selection, for a police officer (instructor) position, was processed via certificate NW8-GS0083-07-K1059014-VA-C-MP-28. *Id.* As part of the reconstructed selection process, the agency stated that it reissued these certificates and convened a selection advisory board. *Id.*; *see id.* at 17-18 (appointment of the selection advisory board members), 29-32 (the agency's reissued certificates³). The appellant argued that seven officers were promoted to lead police officer (sergeant) and two to instructors. Compliance File, Tab 4 at 3.

¶9 The selecting official for the reconstructed selection process was Commander Dennis Quick. HT (Quick); *see* Compliance File, Tab 3 at 17. However, Chief Garrel Mercer, and not Commander Quick, was the selecting official during the original selection process. *See* Compliance File, Tab 3 at 10-16 (the agency's original certificates); HT (Ramming). But since Chief Mercer was on detail at the time of the original selection process and because he was no longer on detail at the time of the reconstructed selection process, the agency

³ It appears from the agency's re-issued certificate that the correct certificate number for the lead police officer (sergeant) position was NW7-GS0083-07-K1802237-1-C-MP-17. *Id.* at 29.

apparently determined he could not participate in the reconstructed process as a selecting official.⁴ HT (Ramming).

¶10 Commander Quick admitted in his testimony that he did not remove the original selectees from their positions during the reconstructed selection process. HT (Quick). He testified that he compared the resumes of the original selectees with the appellant's resume in order to compare their qualifications. *Id.*; *see* Compliance File, Tab 3 at 27. Commander Quick concluded that, based on his review of these resumes, the appellant's qualifications "did not put him out of the process," which we understand to mean that his qualifications were essentially comparable to the original selectees' qualifications. HT (Quick).

¶11 Additionally, a selection board was convened in March 2009. Administrative Director Karen A. Ramming was the Chairperson, John C. Roach was the Equal Employment Opportunity representative, and Command Master Chief Dennie W. Moore and Human Resources Specialist Michelle Hawes were appointed as members of the board.⁵ *See* Compliance File, Tab 3 at 17. The members on the selection board for the reconstructed selection process were not the same members on the selection board for the original selection process. HT (Quick). Ms. Ramming testified, however, that she believed that her selection board used the same interview questions that were used during the original selection process. HT (Ramming).

¶12 The selection board interviewed the appellant on March 18, 2009. *See* Compliance File, Tab 3 at 26. Ms. Ramming's copy of the interview questions for the lead police officer (sergeant) position and the numerical scores that she gave the appellant, based on his responses, are in the record. *See id.* at 20-22.

⁴ Chief Mercer testified at the hearing but neither of the parties asked him any substantive questions about the original selection process.

⁵ Hawes testified that she was present during the appellant's interview as a human resources advisor, but that she did not score his responses or otherwise evaluate him for the police officer positions. HT (Hawes).

She testified that she gave the appellant a low interview score because of his poor responses to some questions. *See* HT (Ramming) (indicating that she was concerned that he scored low on a question involving child abuse and that, given his experience, she expected that his scores should have been higher). The record contains an additional score sheet for the appellant. Compliance File, Tab 3 at 23-25. The agency indicated that this was Command Master Chief Moore's score sheet. *See id.* at 8 (referring to Exhibit 6). We note, however, that Command Master Chief Moore did not testify in this matter. The record does not contain score sheets from remaining selection advisory board members Roach or Hawes, and neither Roach, nor Moore, testified in this matter. Further, there are no score sheets for the police officer (instructor) positions or for the original selectees for the GS-7 positions. The record does not contain the interview questions or answers for the original selectees. It also does not contain the resumes of the original selectees.

¶13 On the same date as the appellant's interview, the selection board convened for the reconstructed selection process recommended his nonselection for the lead police officer and police instructor positions, based on his responses to the interview questions. *See* Compliance File, Tab 3 at 26. Commander Quick testified that the selection board's recommendation "weighed heavily" in his decision, HT (Quick), and he ultimately did not select the appellant for any GS-7 police officer positions under the relevant vacancy announcement during the reconstructed selection process. *See id.* at 27.

The agency's reconstructed selection process does not comply with the RID.

¶14 Because the vacancy was announced under merit promotion procedures, preference eligibles or veterans, like the appellant, "may not be denied the *opportunity to compete* for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures." [5 U.S.C. § 3304](#)(f)(1) (emphasis supplied). For the following reasons, we are not persuaded that the appellant was

given an opportunity to compete, consistent with VEOA, during the reconstructed selection process.

¶15 First, the agency did not remove the original selectees from their respective GS-7 police officer positions during the reconstructed selection process. When questioned about why he did not remove the original selectees from their positions during the reconstructed selection process, Commander Quick explained that he was not instructed to fire any of the selectees. HT (Quick). In *Weed v. Social Security Administration*, [110 M.S.P.R. 468](#), ¶ 10 (2009), the Board recently addressed a situation where the agency “engaged in a ‘hypothetical’ [reconstructed selection] process” because it “did not make real selections for the Social Insurance Specialist Claims Representative [SISCR] position” and that “one of the two individuals appointed to the [SISCR] position by the agency remains in the position.” There, the Board addressed the agency’s argument that it was not required to remove other employees whose appointments violated VEOA because to do so would violate, among other things, the selected employees’ due process rights. *Id.*, ¶ 13. The Board reiterated the rule that, in a reconstructed selection process, “an agency must remove the improperly appointed incumbent from the position.” *Id.* (citing *Marshall v. Department of Health & Human Services*, [110 M.S.P.R. 114](#), ¶ 8 (2008)); *Endres*, [107 M.S.P.R. 455](#), ¶ 20. The Board also advised the agency that it “need not remove the individual from the federal service, but need only remove the individual from the position he or she holds as the result of the improper appointment.” *Weed*, [110 M.S.P.R. 468](#), ¶ 13. Because the Board concluded that the agency did not properly reconstruct the selection process, it ordered the agency to reconstruct the selection process again. *Id.*, ¶¶ 10, 14.

¶16 In the CID, the administrative judge determined that, “[s]ince these officers were not unlawfully selected in violation of the Office of Personnel Management’s pass over regulations, as occurred in *Endres* . . . , the agency was under no obligation to remove the selectees in order to fairly consider the appellant.” Compliance File, Tab 11 at 5. We do not agree with the

administrative judge's narrow interpretation of this issue. The agency's obligation to remove the selectees during a reconstructed selection process is not triggered by the pass over requirements identified in the relevant statutes or regulations, but rather, by the Board's order to reconstruct the selection process consistent with applicable law. *See, e.g., Weed*, [110 M.S.P.R. 468](#), ¶ 9 ("The Board has also held that reconstructing the selection process requires removing from the position any individual improperly appointed to the position at issue.") (internal citations omitted); *Dow v. General Services Administration*, [109 M.S.P.R. 342](#), ¶ 10 (2008) ("Here, the agency has provided no evidence that it has removed individuals selected from the [Outstanding Scholar Program] to fill the [Chief People Officer] Intern positions. Thus, the agency is still in violation of [5 U.S.C. § 3304\(b\)](#).").

¶17 In light of this precedent, we similarly conclude that the agency's reconstructed process in this matter was hypothetical, and therefore violated the appellant's right to compete under merit promotion procedures, because it did not remove the original selectees from the GS-7 police officer positions. As noted in *Weed*, Commander Quick (or the selecting official) need not fire the original selectees; however, the original selectees must be removed from the GS-7 positions to which they were improperly appointed and reassigned to another position in order to comply with VEOA.

¶18 Second, the members of the reconstructed selection board were not the original selection board members. Moreover, it does not appear that any members of the reconstructed selection board discussed the original selectees' interviews with any of the original selection board members, that the original selectees were re-interviewed by the reconstructed selection board or that the original selectees' scores or score sheets, based on their responses to the interview questions, were compared to the appellant's score or score sheet during the reconstructed selection process. Because Commander Quick did not have comparable assessments of the original selectees before him during the

reconstructed selection process, we cannot conclude that the appellant actually competed with the original selectees.

¶19 Third, it is unclear from the record how many GS-7 positions were originally filled under the relevant vacancy announcement. While the agency contends it was two, the appellant asserts nine positions were filled. The record evidence does not resolve this issue to our satisfaction. In order to properly reconstruct the hiring process, the agency must rely on the circumstances at the time of the original selections, including filling the same number of positions during the reconstructed process as it did in the original one. *Williams v. Department of the Air Force*, [110 M.S.P.R. 451](#), ¶¶ 8, 10 (2009).

¶20 For these reasons, we conclude that the appellant was not given an opportunity to compete, consistent with VEOA, for the GS-7 police officer positions during the reconstructed selection process. *See, e.g., Joseph v. Federal Trade Commission*, [505 F.3d 1380](#), 1383-84 (Fed. Cir. 2007) (finding that an individual's rights under VEOA were not violated because he was "given a full 'opportunity to compete' in the merit selection process by which the appointment was made," i.e., he submitted an application, he was one of four applicants who qualified for final consideration, and he and the other three applicants were interviewed before a final selection was made; his subsequent nonselection did not mean that he did not have a "full 'opportunity to compete'").

Relief

¶21 An individual, like the appellant, whose right to compete under merit promotion procedures has been violated, is not normally "automatically" entitled to the position for which he applied. *Deems v. Department of the Treasury*, [100 M.S.P.R. 161](#), ¶ 17 (2005); *but see Marshall v. Department of Health & Human Services*, [587 F.3d 1310](#), 1316-17 (Fed. Cir. 2009) (where the record is clear that the appellant would have been selected absent the veterans' preference violation, the appropriate remedy is to place the appellant in the position for which he applied). Rather, in light of our expressed concerns, the appropriate remedy is

for the agency to reconstruct the selection process, so that he has a *bona fide* opportunity to compete.⁶ See [5 U.S.C. § 3330c\(a\)](#) (the Board “shall order the agency to comply with” veterans’ preference statutes and regulations); see also *Marshall*, [110 M.S.P.R. 114](#), ¶ 9; *Dow*, [109 M.S.P.R. 342](#), ¶ 16; *Endres*, [107 M.S.P.R. 455](#), ¶ 20. This time, however, we are including specific instructions to the agency, so that it understands our expectations regarding the reconstructed selection process. See, e.g., *Williams*, [110 M.S.P.R. 451](#), ¶ 17 (directing the agency to comply with several instructions); *Dow*, [109 M.S.P.R. 342](#), ¶ 16 (setting forth requirements for the agency’s second reconstructed selection process); *Endres*, [107 M.S.P.R. 455](#), ¶ 20 (ordering the agency to reconstruct the selection process for the Chief Financial Officer position with specific instructions).

ORDER

¶22 Because of the deficiencies in the agency’s reconstructed selection process, we ORDER the agency to provide a list of the names of the candidates originally selected for the GS-7 police officer positions since July 30, 2007, at the Dahlgren location under vacancy announcements DON0083. We further ORDER the agency to reconstruct the selection process for these positions, in accordance with this Opinion and Order and with VEOA, by following these instructions: (1) the agency must remove as selectees all individuals originally selected for the GS-7 police officer positions in question; (2) the agency shall compare the resumes of the original selectees with the appellant’s resume; (3) the agency shall ensure that the appellant was asked the same interview questions as the original selectees; (4) the agency shall compare the original selectees’ responses to the selection board’s interview questions (and scores) with the appellant’s responses to the selection board’s questions (and score) or it must re-interview all of the original selectees

⁶ In light of our disposition, we need not address the other issues discussed by the administrative judge in the CID.

as well as the appellant; (5) the agency must identify all candidates selected for the positions in the reconstructed selection process; and (6) if the agency does not select the appellant for a GS-7 police officer position in its next reconstructed selection process, it must provide an explanation for his nonselection and evidence showing that its reconstruction process was done correctly. This would include resumes, interview questions and responses, and score sheets for all candidates, among other forms of evidence.

¶23 We ORDER the agency to submit proof of compliance with the above instructions no later than 30 days after the date of this decision. Failure to comply with this deadline will lead to the issuance of a show cause order to explain why the Board should not order that Commander Dennis Quick, the agency's official responsible for compliance, "shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with." [5 U.S.C. § 1204](#)(e)(2)(A).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO RESPOND
TO THE AGENCY'S ACTIONS

¶24 You may respond to the agency's evidence of compliance within 15 days of the date of service of that evidence. If you do not respond, the Board will assume that you are satisfied and will dismiss the petition for enforcement as moot.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.